STATE OF MICHIGAN

COURT OF APPEALS

DEPARTMENT OF ENVIRONMENTAL QUALITY and DIRECTOR OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY,

Plaintiffs-Appellees,

v

SOUTH HURON VALLEY UTILITY AUTHORITY,

Defendant-Appellee,

and

CITY OF FLAT ROCK,

Intervening Defendant-Appellant.

UNPUBLISHED
July 24, 2007

No. 265964
Ingham Circuit Court
LC No. 04-000818-CE

DEPARTMENT OF ENVIRONMENTAL QUALITY,

Plaintiff-Appellee,

v

SOUTH HURON VALLEY UTILITY AUTHORITY,

Defendant-Appellee,

and

CITY OF FLAT ROCK,

Defendant-Appellant.

No. 268039
Ingham Circuit Court
LC No. 04-000818-CE

Before: Talbot, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

In Docket No. 265964, intervening defendant City of Flat Rock appeals by leave granted from the September 28, 2005, trial court order that granted defendant South Huron Valley Utility Authority's (SHVUA) motion to enforce a consent judgment. In Docket No. 268039, Flat Rock appeals the September 23, 2004, order denying Flat Rock's motion to vacate a consent judgment.[1] We consolidated these appeals. *Dep't of Environmental Quality v South Huron Valley Utility Auth*, unpublished order of the Court of Appeals, entered May 23, 2006, (Docket No. 265964). We affirm both of the trial court's rulings.

In 1997, SHVUA was created pursuant to the Sewage Disposal, Water Supply and Solid Waste Management System Authorities Act, MCL 124.282, which permits the incorporation of such an authority by any two or more municipalities. Flat Rock is one of several member constituents of SHVUA.

SHVUA operates a wastewater treatment plant that serves several communities in Wayne and Monroe counties. The wastewater treatment plant had an original primary treatment capacity of 24 million gallons per day and a secondary treatment capacity of 12 million gallons per day. The original plans called for an equalization basin[2]; however, that was not implemented. During times of extreme wet weather, wastewater would bypass the secondary treatment system and discharge into the Detroit River. Consequently, SHVUA was cited by the Department of Environmental Quality (DEQ) for the discharges in violation of the Water Resources Protection Act, MCL 324.3101 *et seq*.

On June 14, 2002, a plan to construct an equalization basin was approved by SHVUA's member municipalities. Construction bids were solicited and obtained by July 25, 2003. On August 13, 2003, DEQ issued SHVUA a National Pollutant Discharge Elimination System (NPDES) permit, which included a schedule for construction of the equalization basin. Thereafter, SHVUA's Board of Commissioners conducted several meetings, including one in September of 2003, to discuss the allocation of the plan's cost among the member communities. At that meeting Flat Rock initially questioned its proposed cost allocation but took no further action.

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[1] After this Court dismissed Flat Rock's claim of appeal of right from the September 23, 2004, judgment for lack of jurisdiction, *Dep't of Environmental Quality v South Huron Valley Utility Auth*, unpublished order of the Court of Appeals, filed November 9, 2004, (Docket No. 258482), Flat Rock sought leave to appeal from our Supreme Court which ultimately remanded the matter to us for consideration as on leave granted. *Dep't of Environment v South Huron Valley Utility Auth*, published order of the Michigan Supreme Court, filed January 30, 2006, (Docket No. 129515).

[2] Wastewater does not flow into a municipal wastewater treatment plant at a constant rate; the flow rate varies from hour to hour, reflecting the daily water-use patterns of the area served. A Flow Equalization Basin is a tank designed to collect and store wastewater, from which the wastewater is then pumped into the treatment plant at a constant rate.

On January 16, 2004, DEQ and SHVUA entered into an administrative consent order (ACO). It included a schedule for the equalization basin and allocated cost for the equalization basin among SHVUA constituent municipalities. SHVUA sent notice of the ACO to its constituent municipalities shortly thereafter. Flat Rock subsequently failed to attend SHVUA's February 18, 2004, regular meeting and it never objected to the ACO as entered or took action with respect to the ACO.

The equalization basin project eventually stalled and, on June 8, 2004, DEQ filed a complaint to enforce the ACO. However, on that same date, DEQ and SHVUA entered into a consent judgment which included the provision that SHVUA would comply with the ACO and also set forth the agreed upon cost allocation. On July 14, 2004, Flat Rock moved to intervene as a party defendant in the case between DEQ and SHVUA, and it moved to vacate the consent judgment and to change venue. On September 23, 2004, the trial court granted the motion to intervene, but denied the motions to vacate the consent judgment and to change venue. The trial court concluded that Flat Rock was attempting a "back door" challenge to the cost allocation for the project, waiting until the whole process was complete and then attempting to overturn it. The trial court noted that Flat Rock failed to exhaust its administrative remedies in this case, finding that Flat Rock had an obligation to take reasonable steps to protect its interests. Flat Rock appealed and, as noted earlier, this court dismissed the appeal for lack of jurisdiction.

In the subsequent months, Flat Rock failed to pay its share for the equalization basin. SHVUA filed its petition to compel Flat Rock to comply with the consent judgment, or, alternately, requested an order holding Flat Rock in contempt for failure to comply with the consent judgment. The trial court entered an order requiring that Flat Rock's mayor appear to show cause why the trial court should not grant the relief sought by SHVUA. Ultimately, SHVUA filed a motion to enforce the consent judgment, which was granted on September 28, 2005. On October 19, 2005, Flat Rock filed for leave to appeal, which was granted. Flat Rock's appeals were subsequently consolidated.

On appeal, Flat Rock first argues that it was not bound to abide by the consent judgment because it was not a party to it. We disagree.

This Court reviews a trial court's decision to enforce or vacate a consent judgment for an abuse of discretion. *Inverness Mobile Home Community, Ltd v Bedford Twp*, 263 Mich App 241, 246; 687 NW2d 869 (2004); *Trendell v Solomon*, 178 Mich App 365, 370; 443 NW2d 509 (1989). An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). This Court reviews de novo the interpretation of a contract. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003). The findings of fact underlying a trial court's determination whether a valid contract was formed are reviewed for clear error; a finding is clearly erroneous if the reviewing court, on the whole record, is left with the definite and firm conviction that a mistake was made. *Bynum v ESAB Group, Inc*, 467 Mich 280, 285; 651 NW2d 383 (2002).

A consent judgment is not a judgment of the court, but a judgment of the parties; thus, a consent judgment is contractual in nature. *Draughn v Hill*, 30 Mich App 548, 553; 186 NW2d 855 (1971). This Court has previously held that clear contracts are not open to judicial construction; competent persons have the utmost liberty of contracting; and their agreements

voluntarily and fairly made must be held valid and enforced in the courts. *Lentz v Lentz*, 271 Mich App 465, 471; 721 NW2d 861 (2006); *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 422 NW2d 705 (1989). Further, a consent judgment binds those in privity with the parties to a contract. *Knowlton v City of Port Huron*, 355 Mich 448, 454-455; 94 NW2d 824 (1959). A trial court has broad powers including the authority to make any order proper to fully effectuate its jurisdiction and judgments. MCL 600.611; *Spurling v Battista*, 76 Mich App 350, 353; 256 NW2d 788 (1977).

Here, the consent judgment entered into between DEQ and SHVUA is binding as to Flat Rock because Flat Rock is one of the municipalities that created, and governs, SHVUA, a public body corporate that was empowered to enter into such contracts. See MCL 124.282 *et seq*. As a constituent municipality of SHVUA, Flat Rock was, at least, in privity with SHVUA when SHVUA entered into the consent judgment with DEQ, which is charged with protecting and conserving the water resources of the state. MCL 324.3101 *et seq*.

Both MCL 124.284(1) and SHVUA's articles of incorporation provide that SHVUA possesses "all the powers necessary to carry out" and "to acquire, construct, finance, purchase, own, improve, enlarge, extend and operate a sewage disposal system, a solid waste management system, and/or a water supply system." SHVUA's regulations provide that it will "[c]omply with all local, state, and federal laws and regulations pertaining to [its] sewer system and its operation and maintenance." And SHVUA's rules and bylaws provide:

> Any capital improvement to the system, including expansion of the plant shall be the primary responsibility of the Authority. The cost thereof and the method of payment shall be determined by the Authority.

In short, when SHVUA entered into the ACO and consent judgment, it was acting consistent with its powers, which include "all the powers necessary to carry out the purposes of its incorporation and those incident thereto." MCL 124.284(1). As one of SHVUA's principle creators and part of its governing body, Flat Rock was bound by SHVUA's actions, including the ACO and consent judgment it entered into. Therefore, the trial court did not abuse its discretion when it denied Flat Rock's motion to vacate the consent judgment. See *Woodward*, *supra* at 557.

In reaching this conclusion we acknowledge Flat Rock's other arguments in support of relief that we reject. Flat Rock asserts that DEQ and SHVUA attempted to circumvent MCL 124.281 *et seq*. by entering into an ACO and consent judgment. This argument fails to consider DEQ's broad mandate to enforce the Water Resources Protection Act and SHVUA's obligation to follow all federal, state, and local laws.

Flat Rock further argues that the DEQ and SHVUA were engaged in a fictional adversarial proceeding, as an attempt to circumvent the legislatively approved processes; Flat Rock relies on *Vestevich v West Bloomfield Twp*, 245 Mich App 759; 630 NW2d 646 (2001), for this proposition. In that case, the plaintiff challenged the defendant's continued enforcement of its zoning ordinance. *Id*. at 761. This Court concluded that the zoning ordinance was valid. *Id*. The plaintiff filed, but did not notice, a motion for reconsideration; although the parties subsequently "persuaded the trial court to enter a consent judgment," where the defendant allowed the plaintiff to develop its land commercially in exchange for concessions. *Id*. Adjacent

owners moved to intervene and to set aside the consent judgment; the trial court granted both motions. *Id*. This Court noted that the trial court treated the plaintiff's motion for reconsideration as a motion for relief from judgment. *Id*. at 763. This Court concluded:

> [P]laintiff's postjudgment motion, filed and acted on years after the underlying case was closed, did not revive that litigation for purposes of providing a basis for a consent judgment. In the matter of their consent judgment, plaintiff and defendant were parties to a case only in a fictional sense. [*Id*.]

In reaching that conclusion, this Court noted that legislatively established authorities must render a final decision on zoning variances before the issue was ripe for judicial review. *Id*. at 764.

The instant case involved an ACO where DEQ and SHVUA sought to rectify violations of MCL 324.3101 *et seq*., by instituting an upgrade to SHVUA's wastewater treatment plant with its corresponding construction schedule and cost allocation. Unlike *Vestevich*, DEQ and SHVUA present a real controversy involving the violation of MCL 324.3101 *et seq*., and corresponding fines and penalties.

Flat Rock also suggests that SHVUA cannot issue bonds without entering into contracts with its constituent municipalities pursuant to MCL 124.287(1). But Flat Rock's argument overlooks the precatory language of the statute, which provides:

> The authority and any of its constituent municipalities *may* enter into a contract or contracts providing for the acquisition, construction, improvement, enlargement, extension, operation, and financing of a sewage disposal system, a water supply system, a solid waste management system, or a combination of systems, which contract or contracts shall provide for the allocation and payment of the share of the total cost to be borne by each contracting municipality in annual installments for a period of not exceeding 40 years. [MCL 124.287(1) (emphasis added).]

SHVUA was not obligated to enter into any contract with Flat Rock.

Flat Rock also argues that SHVUA acted outside of its scope of authority. Flat Rock contends that the ACO and consent judgment were not valid, because SHVUA could not agree to certain provisions without unanimous consent of its constituent municipalities. But, even if SHVUA's articles of incorporation did call for a unanimous vote there was evidence of unanimity with regard to several critical provisions, including the approval of the construction project and the cost allocation. Approval of the actual construction contract is not at issue herein.

Next, Flat Rock contends that it should not have been estopped from contesting the terms of the consent judgment by the doctrine laches. We disagree. A trial court's application of laches is reviewed for clear error. *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 252; 704 NW2d 117 (2005). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*. (citations omitted).

In the first proceeding, SHVUA argued that laches barred Flat Rock's motion to intervene. The trial court did not address SHVUA's laches contention at that time, but indicated that Flat Rock had to exhaust its administrative remedies. At the next proceeding, SHVUA moved to enforce the consent judgment, asserting that laches barred Flat Rock's objection to the consent judgment. Flat Rock did not respond to SHVUA's laches argument, but indicated that it did not need to exhaust administrative remedies. The trial court seemed to integrate the doctrine of laches into its ruling to grant SHVUA's motion to enforce the consent judgment.

The doctrine of laches is an equitable tool that remedies "the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert." *Wayne Co*, *supra*. Laches applies to cases where one party has "an unexcused or unexplained delay in commencing an action," and another party had "a corresponding change of material condition that results in prejudice." *Id*. (citations omitted). Laches does not apply in a case where "neither party has changed materially, and the delay of one has not put the other in a worse condition." *Id*. (citations omitted).

We agree that the doctrine of laches bars Flat Rock's challenge to the terms of the consent judgment. Flat Rock, a constituent municipality, fully participated in the several proceedings leading up to the ACO. Many of these proceedings involved discussions related to the cost allocation, as well as other provisions. Flat Rock, through its representative, initially voiced an objection to the proposed cost allocation in December 2003, but failed to attend the February 2004 meeting after SHVUA sent notice regarding the actual entry of the ACO with DEQ on January 16, 2004. Flat Rock failed to take any action with regard to the cost allocation and only moved to intervene in July of 2004, more than two years after the plan for the equalization basin was presented and adopted. In that intervening time, several events occurred giving rise to opportunities for Flat Rock to act.[3]

And Flat Rock's argument that SHVUA was not prejudiced is self-serving. SHVUA demonstrated the requisite prejudice required in foreclosing Flat Rock's claims by operation of the doctrine of laches. SHVUA indicated that low interest financing would be lost; the construction bid would lapse; subsequent bids would be higher; construction delays would make NPDES permit compliance impossible; and construction delays would result in further unauthorized bypasses in violation of MCL 324.3101 *et seq*. if Flat Rock was provided with relief from the consent judgment. Additionally, work on the project was well under way and bonds had been issued by the time this case proceeded to oral argument for the motion to enforce judgment.

On this record, we conclude that SHVUA established that Flat Rock had an unexcused or unexplained delay in commencing its action, and SHVUA had a change of material condition; thus, the doctrine of laches is a proper bar to Flat Rock's challenge to the terms of the consent judgment. See *Wayne Co Retirement*, *supra* at 252.

[3] At oral argument, Flat Rock's counsel asserted that its response was timely since Flat Rock did not receive the ACO until March 2004. However, Flat Rock's counsel conceded that Flat Rock received the letter regarding the entry of the ACO in late January 2004. While the ACO was not attached to that correspondence, Flat Rock was aware of its contents from its previous objection.

Finally, we note that Flat Rock argues that venue was improper. We agree. However, no appellate relief is warranted. See MCL 600.1645; *Bass v Combs*, 238 Mich 16, 22; 604 NW2d 727 (1999).

Affirmed.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter